

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original

77-7021

To be argued by:

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ALLEN P. SCHLEIN, M.D.

Plaintiff-Appellant

V.

THE MILFORD HOSPITAL, INC.

Defendant-Appellee

On Appeal From Decision Of The United States
District Court, District of Connecticut (Newman, J.)

BRIEF OF APPELLEE

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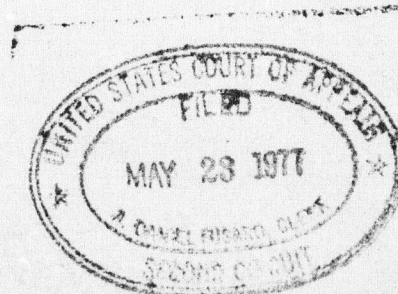


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STATEMENT OF THE CASEPRELIMINARY STATEMENT

This is an appeal from the judgment of the United States District Court for the District of Connecticut (Newman, District Judge) granting a Summary Judgment for the defendant, The Milford Hospital, Inc. The opinion of Judge Newman appears at 423 F. Supp. 541 (D. Conn 1976) and is reproduced in the appendix at pages 167 through 172. A previous opinion of Judge Newman in denying plaintiff's Motion for Temporary Injunction and defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Could Be Granted is reported at 383 F. Supp. 1263 (D. Conn 1975). (App. pp 54-60)

QUESTIONS PRESENTED

1. Did the District Court err in holding that the matter was appropriate for disposition by summary judgment?
2. Did the District Court err in sustaining subject matter jurisdiction on the ground that the hospital's activities constituted "state action" sufficient to render applicable the provisions of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act, i.e. 42 U.S.C. §1983?
3. Did the District Court err in holding that the denial

of staff privileges based on the failure of Dr. Schlein to demonstrate the ability to work well with others was an appropriate standard for application by the hospital?

4. Did the District Court err in holding that the process afforded to Dr. Schlein in the determination of his application for staff privileges was consistent with the requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

SUMMARY OF ARGUMENT

This is an action brought pursuant to the Civil Rights Act, i.e. 42 U.S.C. §1983, in which a licensed physician and surgeon claims that his application to the defendant, a private hospital, was denied in violation of the procedural due process standards of the Fourteenth Amendment and was also arbitrary and capricious in violation of the substantive due process standards of that amendment. The defendant, a private non-profit corporation governed by a Board of Directors made of private citizens, contends that the grant of summary judgment was appropriate in the instant case. The Hospital claims that the detailed documentary record composed of the application, letters of recommendation, the minutes of the proceedings before the Hospital's Credentials Committee and

the Board of Directors, as well as depositions and other pleadings, constituted a documentary record which revealed that there was no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law. However, the defendant Hospital contends that the District Court was in error in sustaining subject matter jurisdiction. The Hospital contends that the Court erred in finding that the private hospital's state involvement was sufficient to render applicable the provisions of the Fourteenth Amendment to the United States Constitution as well as the applicable provisions of 42 U.S.C. §1983. The Hospital contends that the better view with respect to determination of whether a private hospital's activities are sufficiently involved with the State so as to constitute the requisite state action is expressed in the decision in Barrett v. United Hospital, 376 F. Supp 791 (S.D.N.Y. 1974) aff'd mem., 506 F. 2d 1395 (2d Cir. 1974) and that decision should be followed by this Court in finding that the governmental interventions involved in the operation of the Hospital are insufficient to give a private hospital the coloration of state action. In the alternative, should the subject matter jurisdiction of this Court be sustained, the Hospital asserts that the decision below, in denying staff privileges, should be affirmed on the merits. The District Court was correct in finding that the reason for the denial of Dr. Schlein's

application for staff privileges, his inability to demonstrate the ability to work well with others, was an appropriate standard for the application by the Hospital. And the District Court was further correct in finding that the decision of the Hospital in denying the application was accompanied by sufficient procedural safeguards to satisfy the Fourteenth Amendment's Due Process protections. Accordingly, the decision of the District Court in sustaining defendant's Motion for Summary Judgment should be sustained.

STATEMENT OF FACTS

This is an appeal by Allen P. Schlein, M.D., a licensed physician, from a decision of the Board of Directors of a private not-for-profit hospital denying his application to become a member of the Milford Hospital's Medical Staff. Dr. Schlein's application was submitted on June 7, 1973 and processed in accordance with the detailed procedure set forth in the By-Laws, Rules and Regulations of the Medical Staff of the Milford Hospital (See Joint Appendix at pp 403-416 hereinafter cited as "App. p ____"). The application was referred to the Credentials Committee of the Medical Staff, further considered by the Medical Staff at two separate meetings and on two other occasions referred to a special

intraprofessional medical hearing committee (the "Ad-Hoc Hearing Committee"; see App. p 411). It was also considered by the Executive Committee of the Medical Staff and at a de novo hearing before the Executive Committee of the Hospital's Board of Directors. The application was finally rejected by the Hospital's Board of Directors on April 25, 1974.

The Hospital's "state action" involvement as well as the questions related to the Fourteenth Amendment's procedural and substantive due process protections can be viewed only after a clear delineation of the facts relating to the composition, organization, function and management of the Milford Hospital and its Medical Staff. Therefore, a review of the background facts relating to the Hospital and Medical Staff's organization and function in the staff selection process in general, but with reference to the actual operation of that process in Dr. Schlein's case in particular, appears appropriate at this threshold stage.

The Milford Hospital is an acute care facility located in Milford, Connecticut, a city equi-distant seven miles between the cities of Bridgeport and New Haven. It is licensed by the State of Connecticut's Department of Health pursuant to the Connecticut General Statutes and the regulations, the Public Health Code, as a 150 bed short term hospital. See Rules and

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Regulations of Conn. State Agencies, §19-13 (D)(3). Such licensure is a precondition to the operation of the hospital. (See App. pp 89 (§15), 154 (§79-82). It is the only short term licensed general hospital located in Milford. (App. p 89 (§16).

The Milford Hospital, Inc. is a private, non-profit corporation organized and existing pursuant to the Connecticut Non-Stock Corporation Act, as clearly appears from its amended and restated Certificate of Incorporation which is reproduced in the Appendix (See App. pp 417-418). The business and affairs of the Corporation are conducted by a Board of Directors who are elected pursuant to the Corporation's by-laws by the corporators or "members" of the Corporation. The Board, at the time of the decision, consisted of 23 persons. All but four, the Mayor of the City of Milford, two physicians from the Staff and the President of the Hospital's Auxillary, conduct their own private businesses as their major career effort and serve on the Board of The Milford Hospital as a public service and as a contribution to the community (App. p 90, pp 21-2). The by-laws of The Milford Hospital, Inc. provide, inter alia, that the Medical Staff be appointed by the Board of Directors but that the Medical Staff "shall [be] responsible for making recommendations to the Board of Directors concerning initial staff appointments..." and that the Medical Staff exercise its responsibility in accordance with By-laws, Rules and Regulations which incorporate

guidelines established by the Joint Commission on the Accreditation of Hospitals (App. p 425). In accordance with the above provisions of Article IX of the by-laws relating to the selection of the Medical Staff, the Medical Staff of The Milford Hospital adopted, as of November 21, 1972, by-laws, rules and regulations to govern the Medical Staff of the Milford Hospital (see relevant sections of the By-Laws, Rules and Regulations of the Medical Staff of The Milford Hospital reproduced in the Appendix at pp 403-416).

The preamble to those by-laws provides:

"Recognizing that the Medical Staff is responsible for the quality of medical care in the Hospital and must accept and assume this responsibility, subject to the ultimate authority of the Hospital Governing Body and that the best interests of the patient are protected by concerted effort, the physicians and dentists and allied professional personnel practicing in Milford Hospital hereby organize themselves in conformity with the Bylaws, Rules and Regulations hereinafter stated, to which they individually and severally subscribe." (App. p 403)

The above by-laws of the Hospital's Medical Staff were adopted from a model recommended by the Joint Commission on Accreditation of Hospitals of the American Hospital Association, which model is in use in many hospitals throughout the United States. (App. p 91)

The procedure for the determination and grant of staff

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privileges at Milford Hospital involves the processing of a physician's application through various stages, i.e. an application is first filed with the Administrator, then referred to the Medical Staff which has a delegate committee, i.e. the Credentials Committee, which investigates, reviews and ultimately makes a recommendation to the Medical Staff. Thereafter, the Medical Staff recommends appointment or non-appointment to the Board of Directors which is the ultimate appointing authority (see By-laws, Rules and Regulations of the Medical Staff, Art. III, Sec. 5 (1-7) App. pp 407-408). Other sections of the Hospital's Medical Staff By-laws, which impact on the procedure followed in the instant case are as follows:

"Nature of Medical Staff Membership. Membership on the Medical Staff of the Milford Hospital is a privilege which shall be extended only to professionally competent practitioners who continuously meet the qualifications, standards and requirements set forth in these Bylaws". (Art. III; Sec. 1. App. p 404)

"Minimum Qualifications. Only physicians and dentists licensed to practice in the State of Connecticut, who can document their background, experience, training and demonstrated competence, their adherence to the ethics of their profession, their good reputation, and their ability to work with others, with sufficient adequacy to assure the medical staff and the governing body that any patient treated by them in the Hospital will be given a high quality of medical care, shall be qualified for membership on the Medical Staff." (Art. III; Sec. 2. App. p 404, emphasis supplied)

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"The applicant shall have the burden of producing adequate information for a proper evaluation of his competence, character, ethics and other qualifications, and for resolving any doubts about such qualifications." (Art. III, Sec. 5, Sub 1(b); App. p 407)

"The Credentials Committee shall investigate the character, qualifications, references, and standing of the applicant and shall submit a report of findings to the Medical Staff as soon as possible, and in all cases within three months, recommending that the application be accepted, deferred or rejected..." (See Art. III, Sec. 5, Sub (3); App. p 407)

The Medical Staff Bylaws provide further for an elaborate adjudicatory type procedure to extend to aggrieved physicians, such as Dr. Schlein, procedures for review and hearing of an adverse Medical Staff recommendation. Article VII, Sections 1-7 provide that an aggrieved practitioner who has received an unfavorable recommendation with respect to his application for staff privileges at Milford Hospital may obtain a hearing before an Ad Hoc Hearing Committee or Inter-professional Committee of the Medical Staff with respect to his status (Art. VIII, Sections 1-7; App. p 407 et. seq.). The regulations further provide in Article VIII, Section 5, (App. p 411) that at the Ad Hoc Committee hearing that the physician be granted the right to call and examine witnesses, to introduce written evidence, to cross-examine witnesses on any matter relevant to the issue of the hearing, to challenge witnesses and to rebut evidence (see Article VIII, Section 5(i); App. ibid.). Further

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procedural protections are extended in the by-law provision relating to the right of an appeal of an adverse recommendation of the Medical Staff subsequent to a hearing before the Ad Hoc Hearing Committee and for an appeal of that negative decision further to "the governing body" (see Article VIII, Section 6 (a)-(j) - the Board of Directors - App. p 414). The hearing before the governing body is in the nature of a de novo appellate review. The affected practitioner is entitled to view in advance of the hearing all material, favorable or unfavorable, that was considered in making the adverse recommendation or decision against him. He also is provided with the opportunity to submit a written statement in his own behalf and of course to be present at the proceedings. (App. p 415)

Other provisions relating to the procedure to be followed in an appeal to the Governing Body from an adverse determination of an application for staff privileges by an affected practitioner are set forth in detail at pages 409-416 of the Appendix.

Relevant to the "state action" issue is the fact that the hospital's operations are supervised and regulated by the State Department of Health. The Department conducts a "licensure survey" for all short-term general hospitals and other health care institutions licensed by the State of Connecticut in order

to determine whether they continue to meet the requirements of the Public Health Code, i.e. Regulations of the State of Connecticut, §19-13(D)(3). And although the mere infusion of federal funding has been held to be not determinative of the "state action"¹ issue, the Hospital since the establishment and inception of the Hill-Burton program (Hospital Survey and Construction Act, 42 U.S.C. §291 et. seq.) has received \$646,000 in Hill-Burton construction funds distributed on the following dates and in the following amounts:

1968 - New wing and emergency room facility (\$400,000
Hill-Burton out of \$3,300,000)

1963 - Maternity wing (\$150,000 Hill-Burton out of
\$600,000)

1961 - Memorial wing (\$96,000 out of \$400,000) (App.
pp. 25, 89).

The Hospital is qualified as a tax exempt charitable organization by the Internal Revenue Service and has been exempted by the City of Milford from the payment of real property taxes.

The plaintiff, Allen P. Schlein, is a physician and orthopedic surgeon licensed to practice medicine in the State of Connecticut, California, Illinois and Minnesota. Plaintiff at the time of his June 7, 1973 application to the Milford Hospital had an office in The City of Bridgeport and had active

¹ A full explanation and analysis of the cases dismissing similar civil rights complaints by aggrieved physicians in hospitals funded under the Hill-Burton program appears in

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staff privileges at the Park City Hospital, Bridgeport but only courtesy privileges at both Bridgeport Hospital and St. Vincent's Hospital, all in Bridgeport, Connecticut. His previous educational background and intern and residency experience as well as a list of his publications, appears in his application (App. 297-300). Upon its receipt, Dr. Schlein's application was transmitted by the Administrator to the Secretary of the Medical Staff who recorded its receipt and transmitted it to the Credentials Committee of the Medical Staff for a report thereon in accordance with the Bylaws, Rules and Regulations (App. p 305). No action with respect to the Plaintiff's application was taken at the meeting of the Credentials Committee on June 22, 1973 (App. p 302).

On July 30, 1973, Dr. Earl E. VanDerwerker, Jr., coordinator of professional services of The Milford Hospital, Inc. called by telephone one of the Plaintiff's references, Dr. Mark Coventry, Chief of Orthopedics at the Mayo Clinic, Rochester, Minnesota, in reference to the application of the Plaintiff. Dr. Coventry's appraisal in the telephone conversation with Dr. VanDerwerker was a guarded and somewhat mixed appraisal. While praising the work that Dr. Schlein had done in his written examinations, Dr. Coventry at the same time stated

(1 cont.) the well reasoned opinion of Judge Bauman in the Barrett case analyzed infra in Section I B of the Appellee's Argument. See Barrett v. United Hospital,

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that "...there were times [Dr. Schlein] was difficult to work with, and, at times, did not work well with patients..." (App. p 303).

The Credentials Committee of the Medical Staff met on August 23, 1973 and considered the status of Dr. Schlein's application. Dr. Robert Kerin, its chairman, reported that he had telephoned Dr. Anthony Camarda, Chief of Orthopedics at the Park City Hospital, Bridgeport, where Dr. Schlein held staff privileges. Dr. Kerin reported that Dr. Camarda was disinclined to respond to any questions concerning the behavior of Dr. Schlein (App. p 304). Thereafter, on September 11, 1973, Dr. Robert Kerin transcribed for the record (App. p 307) a report of his telephone conversation with Dr. Mark Coventry, Chief of Orthopedics at the Mayo Clinic. Dr. Coventry was reported by Kerin as describing Dr. Schlein as "not having both feet on the ground" and as "erratic". Schlein was not made Chief Resident at the Mayo Program because in Dr. Coventry's opinion, transmitted to Dr. Kerin, he could not be "trusted to be the Chief Resident". Dr. Coventry's conversation with Dr. Kerin together with Dr. VanDerwerker's conversation with Dr. Coventry was construed by the Credentials Committee members as negative factors (App. 180-181, Transcript of Deposition of Nicholas Coassin at p 21).

(1 cont.) 376 F. Supp 791 (S.D.N.Y. 1974) aff'd mem.,
506 F.2d 1395 (2d Cir. 1974). See discussions infra
at pages 34 to 38.

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After recommending to the Medical Staff on September 13, 1973 that Dr. Schlein be granted provisional staff privileges, the Credentials Committee received a September 24, 1973 letter from Dr. Anthony L. Camarda, Chief of Orthopedic Surgery at Park City Hospital who wrote negatively of Dr. Schlein as follows:

"It is felt that he is forceful and energetic towards obtaining his goals, sometimes to the detriment of his colleagues, be they doctors or nurses. Of his qualities as an orthopedic surgeon no one will belittle, but he himself seems to have the highest opinion of his own worth. A truly spicy character that needs tempering at times, seems to emerge, despite all efforts to control his lateral drift.

I am sure that time and experience will eventually enable him to understand what constitute the important qualifications of a good physician." (App. p 309)

The Credentials Committee thereafter, on October 3, 1973 voted to recommend to the Medical Staff that Dr. Schlein's provisional privileges be revoked (App. p 311). But this recommendation was not adopted by the Executive Committee of the Medical Staff (App. p 312).

On October 5, 1973, George R. Plaskowitz, Administrator of the Defendant Hospital, wrote to Dr. Mark Coventry seeking a written evaluation of the applicant, particularly in light

of Dr. Coventry's two previous telephone conversations with Dr. VanDerwerker and Dr. Kerin, and in light of the inconsistencies and conflicts in the votes and recommendations of the Medical Staff (App. p 315). In response to that request, Dr. Coventry summarized Dr. Schlein's term as a resident at the Mayo Clinic from July 1966 to July 1970 and commended Dr. Schlein's examination writing skill and considered his performance adequate. But the letter also stated that Dr. Schlein "at other times...seemed to be in less than normal contact with the problems that faced him day to day in a practical way." (emphasis supplied) While on the other hand noting that Dr. Schlein was not considered "ready for appointment as Chief Resident and expressing the hope that 'he would mature a bit more after leaving our residency'", the Coventry letter concluded by recommending Dr. Schlein for appointment to the Milford Hospital Staff (App. p 316). Dr. Robert Kerin and Dr. Nicholas Coassin, both members of the Credentials Committee, stated at their depositions that they did not consider Dr. Coventry's letter to be a favorable recommendation (Deposition of Robert Kerin, M.D. at p 104-107; Deposition of Nicholas Coassin, M.D. at p 28).

On the same date that Dr. Coventry's letter was received, C. J. Lipkoff, M.D., Chief of Staff of the Milford Hospital Medical Staff, spoke by telephone and then wrote to Dr.

MacEllis K. Glass and Dr. Donald S. Dworken, who were active practicing orthopedic practitioners in the Bridgeport Community. He sought an estimate of the applicant's competence, clinical judgment, and a statement concerning his relations with his peers. He further requested a statement concerning ethical and moral character (App. p 317). Since no response was ever obtained from the above correspondents, members of the Credentials Committee testified at their depositions that the disinclination of two practicing orthopedists in the Bridgeport community to comment either orally or in writing with reference to the qualifications of the applicant was a negative reflection on his application (Depositions of Robert Kerin, M.D. at pp 140-141; Depositions of Nicholas Coassin, M.D. at p 39). On October 23, 1973, Dr. C. J. Lipkoff, Chief of Staff, presented an oral report to the Executive and Professional Committee of the Board of Directors concerning the status of Dr. Schlein's application. Dr. Lipkoff orally reviewed the proceedings to that date and orally stated that the Medical Staff had recommended that Dr. Schlein's request for privileges be denied. Because the report presented was an oral one, the Executive Committee of the Board was of the opinion that the record could not be effectively examined and reviewed. Thus, the Executive Committee unanimously voted to recommend that the application of Dr. Schlein be re-submitted to the Staff

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for further consideration (App. pp 38, 320).

On November 14, 1973, Credentials Committee Chairman Dr. Robert Kerin received a letter from Mortimer W. Zimmerman Executive Director of the Weiss Hospital, Chicago, Illinois. The letter indicated that Dr. Schlein was a member in good standing of the Hospital's staff from July 1, 1970 to March of 1972 and that his ethical and professional relationships were "considered satisfactory". (App. p 322) Earlier, the Credentials Committee had received a favorable letter from Dr. Robert D. Ray, head of the Department of Orthopedic Surgery at the University of Illinois College of Medicine (App. p 306).

At the November 23, 1973 meeting of the Credentials Committee, Dr. Schlein who was in attendance at his request, explained the background of his difficulties with Dr. Anthony Camarda. The conclusion of the Committee was that the explanation by the applicant of the Camarda letter raised a question as to Camarda's remarks possibly being the product of a personal bias (App. p 323, 324). The Credentials Committee, in light of the discussion with Dr. Schlein, decided to resolve the issue by directing the Chairman to do the following:

- "1. Write to the Chief of Orthopedic Surgery at the Bridgeport and St. Vincent's Hospitals and request a positive letter of recommendation from each so that the fears and doubts generated by Dr. Camarda could be laid at rest.

2. Write to the Strauss Clinic where Schlein indicated he was employed to secure their appraisal of this applicant." (App. p 324)

However, the response to the Chairman's request from Walter T. Shanley, M.D., Chief of the Department of Orthopedics at St. Vincent's Hospital, was a distinctly negative letter which stated: "I would under no circumstances extend this man privileges to Milford Hospital. I say this after considering this man's professional and ethical performance in the Bridgeport community." (App. p 325)

While the letter was withdrawn subsequently by Dr. Shanley under the pressure of a libel action threatened to be commenced by Dr. Schlein (App. p 386), the compulsion lying behind the withdrawal did not totally erase the effect of this letter. (App. p 386) Furthermore, Dr. McCreery's response to the Credentials Committee Chairman was uninformative and non-committal. He responded by letter stating that he had no information on which to evaluate Dr. Schlein's performance and reputation since Dr. Schlein had only courtesy privileges at Bridgeport Hospital (App. p 327).

At this stage, a new negative recommendation was received from Dr. Irwin Siegal, a former employer of Dr. Schlein at the Strauss Surgical Group in Chicago. Dr. Siegal's written

response of December 3, 1973 stated that despite the Plaintiff's interest and excellence in orthopedic biomechanics, Dr. Siegal was "...disturbed by his behavior which was sometimes explosive...". Dr. Siegal further stated that he was "not overly impressed with his surgical skills, nor with his clinical judgment in difficult cases." (App. p 326). Dr. Siegal's deposition was taken by Plaintiff's counsel in Chicago on July 8, 1975. At his deposition, Dr. Siegal reaffirmed his negative impression of Dr. Schlein's behavior. Dr. Siegal stated that he was disturbed at Dr. Schlein's frustration tolerance which was sometimes very short and "that he did not conduct himself with the equanimity [sic] which I felt should be present during the situations that he expressed these episodes of 'explosive behavior'". (App. pp 236-237).

On December 6, 1973, the Credentials Committee of the Medical Staff, as appears in the minutes of said Committee on file, voted to recommend to the Medical Staff not to recommend the applicant for privileges at the Milford Hospital. The stated grounds were, in addition to the negative letter from Dr. Irwin Siegal, the negative comments related orally to Dr. Robert Kerin in a telephone conversation with Dr. Siegal at the Strauss Clinic in Chicago and recorded by Dr. Kerin. (App. p 328).

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Furthermore, the Committee relied on the inability of Dr. C. J. Lipkoff as Chief of Staff to obtain a favorable letter from any orthopedist practicing in the City of Bridgeport. Dr. Kerin did not participate in any of the votes of the Credentials Committee or the Staff (App. p 328).

The recommendation of the Credentials Committee was accepted at the December 7, 1973 meeting of the Medical Staff and was communicated to the applicant by the Administrator on December 7, 1973. The Administrator also enclosed with his notice of denial a copy of the Bylaws, Rules and Regulations of the Medical Staff (App. p. 331). Pursuant to Article VIII of the Bylaws, Rules and Regulations of the Medical Staff of the Milford Hospital, the applicant made demand on December 18, 1973 for a statement of the reasons considered by the Medical Staff in reaching the adverse decision (App. p 332). On December 28, 1973, George R. Plaskowitz, Administrator, responded to Dr. Schlein's request. The December 28, 1973 letter, as more particularly appears in the joint appendix, summarized the reasons for the recommendation of the denial of the Plaintiff's application (App. p 340-341). The letter further informed him pursuant to Article VIII, Section 5(a)(1) of the Bylaws that the Plaintiff's application for an intra-professional hearing before an Ad Hoc Hearing Committee would be conducted on January 3, 1974

at 6:00 P.M. As the hearing was to resolve on an "intra-professional basis" matters bearing on the professional competency and conduct of the applicant, it was the judgment of the Hearing Committee that this purpose could be accomplished best by neither side being represented by an attorney at law (App. ibid at 340).

At the Ad Hoc Committee the applicant appeared with his partner, Dr. Allen Lewis, who was present throughout the proceedings to assist him. The applicant presented favorable letters to the Hearing Committee from Peter E. Hope-Ross, M.D., Chief of the Medical Staff, Park City Hospital of December 19, 1973, Walter S. Wiggins, M.D., December 19, 1973, Walter A. Hoffman, M.D., December 22, 1973, and Pauline M. Spelke, Administrator, Park City Hospital (See letters in Joint Appendix at pp 335, 336, 337 and 339).² The Ad Hoc Hearing Committee rendered a decision on January 21, 1974 as follows:

² | The Minutes of the Ad Hoc Committee Meeting of January 3, 1974 have not been reproduced in the appendix, The transcript of that hearing, a copy of which was provided to Dr. Schlein, is a part of the record and may be referred to for the purpose of acquainting the Court with the lengthy and detailed attention paid by the Medical Staff Committee to the application. The Hearing Minutes demonstrate that the Medical Staff was not concerned with the applicant's technical surgical competence but was very much concerned with his temperament and suitability to work on a small hospital's medical staff.

"The Ad Hoc Committee has considered the previously and newly submitted letters, some favorable and some unfavorable, to Dr. Allen Philip Schlein. Dr. Schlein impressed us with his work in Total Joint Arthroplasty, but we do not feel this expertise is appropriate to the present needs of Milford Hospital. By unanimous vote, the Ad Hoc Committee does not find sufficient reason to recommend a change in the previous staff decision denying Dr. Allen Philip Schlein an appointment to the Milford Hospital Staff." (App. p 344)

The recommendation of the Ad Hoc Hearing Committee was unanimously accepted by the Medical Staff at its meeting of January 22, 1974 (App. p 345). On January 23, 1974, George R. Plaskowitz, Administrator, informed Dr. Schlein of the decision of the Ad Hoc Committee and its affirmance by the Medical Staff (App. p 346). Thereafter on February 1, 1974, counsel for Dr. Schlein requested an appellate review pursuant to Article VIII, Section 6(g) of the Bylaws, Rules and Regulations of the Medical Staff.

Counsel for Dr. Schlein requested, as provided for in the Bylaws, the right to conduct an oral argument and this request was granted. Counsel for Dr. Schlein also submitted prior to the hearing a "written statement of applicant setting forth in detail affirmative case in support of applicant's contentions".

On February 20, 1974, one week before the applicant's hearing before The Appellate Review Committee of the Hospital Board,

counsel for the Hospital delivered to Dr. Schlein's counsel copies of all documents comprising the record in the matter, including copies of all minutes of the Credentials Committee, the minutes of the Medical Staff, minutes of the Executive Committee and the Board of Directors, all correspondence and memos and all transcriptions of notes and telephone conversations. Although the Board's Bylaws permit the introduction of new or additional matters not raised before the Ad Hoc Committee only in "unusual circumstances", the applicant's counsel's request for permission to introduce such new material into the record at the appellate review hearing was granted, and counsel did submit additional letters at that hearing from Dr. Fred F. Nathan, and three letters from prior correspondents: Dr. Mark B. Coventry, Dr. Irwin Siegal and Dr. Walter Shanley. All three letters, it was revealed at the appellate review hearing, resulted from Dr. Schlein's counsel's written and oral communications to the physicians after Dr. Schlein had at first been denied staff privileges (see verbatim proceedings in the transcript of the Meeting of the Executive Committee at pp 27, 36).^{3|}

^{3|} An example of the communication sent by Dr. Schlein's counsel to the writers is contained in counsel's letter of February 18, 1974 to Dr. Siegal: "At the time of our conversation, I requested a clarification of the [previous] letter and you suggested I submit exact wording. I hesitate to do so as it could conceivably be considered to be a contrived letter". (Emphasis supplied) (See App. p 383).

Appellant's counsel also introduced Dr. Walter Shanley's second letter dated February 8, 1974 (App. p 356). It was explained at the hearing that the letter, which was addressed to Dr. Kerin, the Credentials Committee Chairman, was received by Dr. Kerin at the Hospital on February 15, 1974. Dr. Schlein's counsel explained as a prelude to the introduction of the second Shanley letter that he had spoken with Dr. Shanley by telephone during the week of February 20, 1974 and had confirmed with Dr. Shanley that a letter of retraction had been sent by Dr. Shanley sometime after February 8, 1974. Although questions were raised at the appellate review hearing as to whether Dr. Shanley, in retracting the original letter, was acting "...under a certain amount of duress...",⁴ as a result of Dr. Schlein's threats to take legal action, the Shanley retraction was duly introduced into the record.

Based on the fact that the state of the evidence which formed the basis of the Medical Staff's prior recommendation to deny privileges to Dr. Schlein had been changed significantly as a result of the withdrawal by Dr. Shanley of his negative letter, the Appellate Review Committee adopted the following resolution at its March 20, 1974 meeting:

⁴ Remarks of Dr. Robert Weston, Chairman of the Ad Hoc Hearing Committee at the appellate review hearing; (Transcript of appellate review hearing at p 51.)

"That the adverse recommendation of the Medical Staff with respect to the application of Dr. Allen P. Schlein for privileges at the Milford Hospital be referred back to the Medical Staff for further reconsideration, review and further recommendation, said recommendation to be made to the Appellate Review Committee within 21 days of the date of the receipt of this report of referral." (App. p 384).

The resolution of the Appellate Review Committee of March 20, 1974 was communicated in letter form by the Administrator to Dr. Schlein and to Dr. C. J. Lipkoff, Chief of Staff, for further investigation and fact finding by the Staff. In an exercise of its discretion, the Medical Staff resolved to recommit the matter to the Ad Hoc Committee which had previously met on January 3, 1974, so that Committee could reconsider the Staff's previous actions. The Ad Hoc Committee was reconvened and met on April 2, 1974. The report of the Ad Hoc Committee contains the following findings:

"The principal point of issue, new information, seemed to resolve around a letter by Dr. Shanley retracting his original letter about Dr. Schlein. Dr. Schlein admitted that pressure was brought to bear on Dr. Shanley through Dr. Parker, Chairman of the Board of Censors, Fairfield County Medical Society. His attorney, John Coughlin, stated "he asked him [Dr. Shanley] to retract it" and if not, we would have pursued a litigation.

The balance of new information is such that the Committee does not change its opinion about not recommending Dr. Allen Philip Schlein for appointment to the Milford Hospital Medical Staff." (App. p 386).

The Medical Staff of the Milford Hospital accepted the recommendation of the Ad Hoc Committee to deny privileges to the applicant on April 15, 1974. Thereafter, on April 25, 1974, George R. Plaskowitz, Administrator, informed the applicant that the Appellate Review Committee received the adverse recommendation of the Medical Staff on April 15, 1974. After a review of the entire record of the proceedings and after further discussion, Mr. Plaskowitz informed the applicant that the Appellate Review Committee voted unanimously to affirm the negative recommendation of the Medical Staff and to deny the application for privileges. The action of the Appellate Review Committee constituted, for the purpose of the Medical Staff Bylaws hearing procedure, the final action of the Board of Directors. On July 5, 1974, the appellant commenced the instant action.

ARGUMENT

I. The District Court Did Not Have Jurisdiction Of The Subject Matter Of The Action.

A. The Court Erred In Finding That The Hospital's Activities Constituted State Action Sufficient To Render Applicable The Provisions Of The Fourteenth Amendment To The Constitution And The Civil Rights Act, i.e. 42 U.S.C. §1983.

In order for the plaintiff to sustain his claims of constitutional and statutory violations, he must initially prove that the Hospital acted under color of state law in order to support a finding of subject matter jurisdiction. To this extent, the judiciary has developed, refined and applied the concept of "state action". The District Court, in ruling on defendant's Motion for Summary Judgment, relied on the state involvement in licensing of both hospitals and physicians coupled with the Hospital's receipt of some federal funds as determinative of the state action issue, while acknowledging that the issue is "not free from doubt". In so ruling, the District Court broke new ground in this Circuit and essentially ignored the principles of a pivotal Supreme Court decision as well as other decisions from this Circuit.

An analysis of the "state action" issue must commence with an examination of the exhaustive decision by the district court in Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y. 1974), aff'd mem., 506 F. 2d 1395 (2d Cir. 1974), (hereinafter "Barrett").

In Barrett, a case which merits close attention both for its exhaustive analysis of the "state action" issue and for the fact that it involves essentially the same facts as the case at bar, the district court culled three touchstone measures^{5|} for state action from the case law:

1. That the State's involvement with the private institution is "significant",
2. That the State must be involved not simply with some activity of the institution...but with the "activity that caused the injury", (hereinafter referred to as the "nexus" requirement) (see Powe v. Miles, 407 F. 2d 73 (2d Cir. 1968), and
3. That the State involvement must aid, encourage or connote approval of the complained of activity. See Reitman v. Mulkey, 387 U.S.369, 380 (1967); Powe v. Miles, supra.

The Barrett court applied this three-prong test to the reasons proffered by the physician plaintiff as to why state action was implicated in the activities of a private hospital:

1) that the hospital performed a public function, 2) that the hospital received extensive Hill-Burton funds, 3) that the hospital was exempt from state and federal taxation, 4) that

^{5|} In the Brief of Appellant, various cases are cited in support of the proposition that courts have found state action in the face of facts similar to those in the instant case. A crucial distinction must be drawn, however, by those cases such as the one at bar and those involving claims of racial discrimination. In the latter, the courts, as recognized in Barrett, are much more lenient in finding state action. The Brief of the Appellant fails to recognize this essential differentiation and cites such cases as Sams v. Ohio Valley General Hospital Assn., 413 F. 2d 826 (4th Cir. 1969), Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (4th Cir. 1963), and Eaton v. Grubbs, 329 F. 2d 710 (4th Cir. 1964) without acknowledging that the

the State of New York, through legislation, regulated virtually all facets of hospital activity, and 5) that the hospital enjoyed a geographical monopoly. Thus each and every claim in demonstration of state action made by Dr. Schlein was made by the plaintiff physician in Barrett. And each and every one of those claims was analyzed, weighed and rejected by the Barrett court. In examining the trifold measure of state action, the court determined that while the State of New York's involvement was significant, the nexus requirement was not satisfied, i.e. the State did not in any way associate itself with the denial or grant of staff privileges. This conclusion was reached in the face of a specific New York statute (with no Connecticut equivalent) which prescribed the procedures to be followed by a hospital in denying a physician staff privileges. The court further held that the third leg of the "state action" tripod was absent since there was no State aid, encouragement or approval of the denial of staff privileges.

The Barrett rationale relied heavily on Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971). In Mulvihill, in addition to the Hill-Burton issue, the Court was also confronted with the claim that the detailed regulation of private hospitals by the State of New

5] cont.) claims of racial discrimination in those cases considerably taint their precedential value. It further bears noting at this juncture that the case of Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (E.D. Pa. 1970) cited at p 46 of the Brief of Appellant is only of questionable authority in view of Haberman v. Lock Haven Hospital, 377 F. Supp. 1178 (M.D. Pa. 1974) and Ozlu v. Lock Haven Hospital, 369 F. Supp. 285 (M.D. Pa. 1974). See Spencer v. The Community Hospital of Evanston, 393 F. Supp. 1072 (N.D. Ill. 1975).

York was a sufficient nexus for a finding of "state action", again directly analogous to the claims made by Dr. Schlein. This contention was rejected with the Court noting that although New York played a substantial role in supervising the operation of the private hospitals within its borders, "the state as part of its general regulatory scheme does not in any way associate itself with or influence the internal decisions of the hospital Board of Trustees to hire, fire staff members". Id., at 1024. The mere fact that New York regulated the facilities and promulgated the standards of care for private hospitals did not per se make the acts of the hospital the acts of the State. Mulvihill concluded that the "nexus" requirement had not been satisfied and that the State did not in any way associate itself with the hospital's method of hiring or firing physicians. Mulvihill v. Julia L. Butterfield Memorial Hospital, supra, at 1024.

The implications of Barrett and Mulvihill for the case at bar are significant. Such significance is further amplified by the Supreme Court's decision in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Although the Court primarily addressed itself to the "public function" exception to the Second Circuit's three-prong test, Jackson is exemplary of the more restricted and narrow view of the hospital's decision with respect to plaintiff's §1983 civil rights "state action" claim. In Jackson, the Supreme Court affirmed the Third Circuit's dismissal of an electric utility customer's damage action under the Civil Rights Act stemming from her complaint that the utility's termination of her service without notice and hearing pursuant to the utility's rule and tariff, approved by the Pennsylvania Public

Utilities Commission, constituted a denial of due process as guaranteed by the Fourteenth Amendment. The utility, although a privately owned Pennsylvania Corporation, held a certificate of public convenience and necessity issued by the PUC empowering it to deliver service to a specific geographic "service area" (emphasis supplied). As a condition of holding its certificate, it was subject to extensive regulation and had in effect, a "...governmentally protected monopoly..." in the area of its service. Jackson v. Metropolitan Edison Co., supra at 589. And although utility companies are regulated and licensed traditionally according to a broadly accepted standard which does not permit duplication of service in a geographic area, the Supreme Court did not view the impact of such a geographically established utility monopoly -- perhaps of greater daily need to Mrs. Jackson than an orthopedic surgeon to a citizen of Milford -- as having the requisite "nexus" to challenge the action, and affirmed the judgment of dismissal below:

"Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulations. The mere fact that a business is subject to state regulations does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Moose Lodge No. 107 v. Irvis, supra at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. Public Utilities Comm'n v. Pollak, 343 US 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Moose

Lodge No. 107, supra, at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. Burton v. Wilmington Parking Authority, supra.....

...Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest " are state actors in all their actions....

...Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated business, providing arguably essential goods and services, "affected with a public interest". We do not believe that such a status converts their every action, absent more, into that of the State." (emphasis supplied, footnotes omitted).

It is against the cumulative force of Mulvihill, Barrett and Jackson that the issue of state action must be judged. As described in fuller detail supra (see Statement of Facts, p. 6 et. seq.), The Milford Hospital, Inc. is a private non-profit hospital whose internal affairs are managed by a Board of Directors composed of 23 private citizens. The method for determination as to the grant or denial of staff privileges is wholly regulated by the Hospital's Medical Staff Bylaws (App. pp 407-408) without any input from or control by any governmental authority. The State of Connecticut does not in any way associate itself with the determination of staff privileges. Governmental input and control impacts at the levels of licensure, Hill-Burton funds and tax exemption.

It is the two former criteria, with emphasis on the state's licensing power, upon which the District Court premised its hold-

ing that the Hospital's activities involved state action.

The Court has viewed Connecticut's regulatory scheme of licensing physicians and hospitals as the creation of a de facto geographical limitation on the plaintiff's right to "practice medicine anywhere in the State". But, respectfully, that rationale is based an overbroad view of the State's role in health facilities regulation generally and with respect to the Milford Hospital, in particular. All states have some form of regulation of the licensing of hospitals which require some objective determination of the need for such a facility in the community. And, absent such a regulation, the erection and construction of a hospital in a community has practical limitations which are imposed by the availability of private and public funds necessary to construct a hospital. Moreover, all states also regulate and license physicians under numerous variants of licensing laws. But the coalescence of those two facts, i.e. the licensing of hospitals, and the licensing of physicians is still far removed from having a direct impact or intrusive involvement on the distinctly private decision of a Medical Staff or a Board of Directors in determining whether a particular physician, already licensed, shall have privileges in a particular hospital, which has already been licensed by the State. The intervening act that breaks the nexus of State involvement is the private act of the Credentials Committee, the Medical Staff and the Board of Directors in evaluating the capabilities, reputation, ethics and past performance of the physician in light of the community's stated needs. It is not apparent how the State involves itself in

the private deliberations and decisions of these private individuals or collective bodies.

Dr. Schlein, in his Brief to this Court, seems to take the analysis one step further by characterizing the State - hospital relationship as a partnership. To describe a private hospital as effectively an arm of the State only demonstrates how preposterous the proposition is in the first instance. Coupling such reasoning with the vast aspects of government regulation of and intervention into the private sector, it would be difficult for a private entity's activities not to constitute state action.

- B. The Decision In Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y. 1974) Affirmed By This Court Without Opinion Represents The Prevailing And Better View With Respect To Determining Whether A Private Hospital's Activities Constitute State Action And Should Be Followed.

The District Court assessed the elements constituting "state action" and determined that while Barrett (and Jackson) require a high degree of state involvement to find state action, Barrett could be distinguished since the court there failed to consider "the significance of a hospital's role in a state system of licensing physicians and hospitals" (App. p 169). The opposite is in fact true. Barrett cannot be so distinguished since it involved even a higher degree of state legislative intervention. Even if, for the sake of argument, the District Court's distinction of Barrett is supportable, it does not excuse a failure to analyze the issue of state action in accordance with the well-settled three-faceted test. Under no circumstances could The Milford Hospital pass that test since the nexus requirement and

the state aid, encouragement and/or approval are clearly absent. If Barrett were followed, the Court could not sustain subject matter jurisdiction.

Applying Barrett, step-by-step, here demonstrates that, despite State licensure of both hospital and physicians, no state action is involved. Even assuming that the level of state involvement is "significant" so as to satisfy the first requirement, several obstacles arise to hurdling the second and third. The State of Connecticut has no involvement with the activity that caused the injury. Its licensing procedures are concerned with satisfaction of the requirements of the Public Health Code, not with the grant or denial of staff privileges. The decision as to staff privileges is purely internal to the hospital, unaffected by any licensing requirements imposed by the State. Finally, there can be no valid claim made as to the State's aid, encouragement or connotation of approval of the Hospital's denials of staff privileges to Dr. Schlein since the State has not in any way associated itself with such a decision. Thus, the Barrett test could not be withstood if applied to the Hospital's denial of staff privileges to Dr. Schlein.

Barrett, to the extent that it represents both the prevailing and better view as to whether a private hospital's activities constitute state action, should be followed. Furthermore, it represents the undisturbed precedent in this Circuit and it would be an insurmountable challenge to propose cogent reasons why it should now be upset. The equities of this case are no different from

those in Barrett or Mulvihill, or those from other circuits discussed infra so as to prod the Court's conscience to reject the precedent. Additionally, the tenor of Barrett echoes that of Jackson where the Supreme Court evidenced its reluctance to find state action absent substantial state interference, and to that extent is wholly consistent with the principles as enunciated by the United States Supreme Court.

The appeal of the Mulvihill - Barrett - Jackson rationale is highlighted by the number of other courts which have adopted it, finding no state action even where a hospital is licensed by the State and subject to various modes of state regulation. For example, in Greco v. Orange Memorial Hospital Corp., 513 F. 2d 873 (5th Cir. 1974), 550 F.2d 1183 cert. denied, 96 S. Ct. 433 (1975), a physician instituted a \$1983 action in behalf of himself and his patients to declare a hospital policy prohibiting performance of elective abortion violative of his First Amendment rights. But, the Court of Appeals affirmed the District Court's dismissal of the action for lack of subject matter jurisdiction, finding no "sybiotic relationship" between the lessor, the Commissioner's Court of Orange County, and the lessee, a private hospital.

The Court, relying on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), concluded that Orange Memorial Hospital was a private hospital operated by the Orange Memorial Hospital Corporation, a non-profit corporation, and that the

"...involvement of the County is not sufficiently related to the Corporation's decision to prohibit elective abortions to justify the imposition of constitutional restrictions upon the daily business of the hospital. Absent a charge of racial discrimination, we are disinclined to press the state action doctrine and all that it entails into the internal affairs of a hospital." ⁶ Id., at 882.

A similar constrictive application is apparent in Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77-78 (9th Cir. 1975), cert. denied. 96 S.Ct. 1420. In Taylor, the Ninth Circuit affirmed the District Court's conclusion that neither the fact that St. Vincent's Hospital had the only maternity department in the City of Billings, Montana, wherein the Plaintiffs had sought and had been denied a tubal ligation, nor the fact that the hospital provided an essential "public service" created a sufficient "nexus" to constitute a sufficient "public function" so as to bring the hospital's activities "under color of state law" within the meaning of 42 U.S.C. §1983. The state had nothing to do with the denial of the surgical procedure.

For similar restrictive interpretations of the "state action" concept which point in the similar direction, see Watson v. The Kenlick Coal Co., cert. den. 422 U.S. 1012 (1975) (Douglas, J. dissenting); The New York City Jaycees v. United Jaycees, Inc., 512 F. 2d 856, 859-860 (2nd Cir. 1975); Re Matteis v. Eastman Kodak, 511 F.2d 306 (2nd Cir. 1975); Doyle v. Unicare, 399 F. Supp. 69 (N.D. Ill. 1975); Spencer v. The Community Hospital of Evanston, supra.

⁶ The courts again emphasize the significance of a claim of racial discrimination when framing the test of state action. See Footnote 5 , supra.

Thus, not only is Barrett the controlling law in this circuit, and not only is good and well-reasoned law, but also it is the prevailing law, representative of the judicial trend of reluctance in finding state action in the activities of a private entity. The clear import, therefore, is that Barrett must be applied to the case at bar. Whether analyzed from the point of view of the facts alone (since Barrett and the instant case are, for the purposes of the "state action" issue, virtually identical) or by application of the three-part test of state action, the conclusion is the same -- the District Court did not have jurisdiction of the subject matter of this action and its decision to the contrary must be reversed.

II. The District Court Was Correct In Its Holding That The Matter Was Appropriate For Disposition By Summary Judgment Since There Is No Genuine Issue of Material Fact And The Hospital Is Entitled To Judgment As A Matter of Law.

Pursuant to Rule 56(c), Fed. R. Civ. P. , the defendant Hospital filed a Motion for Summary Judgment coupled with a Statement of Facts As To Which There Is No Genuine Issue pursuant to Rule 11 of the Local Rules of the United States District Court for the District of Connecticut (App. p 86-105). The Statement of Facts delineated, in some 93 paragraphs, all of those relevant facts which defendant perceived as being undisputed. In assessing the Hospital's Motion for Summary Judgment, the District Court had before it, aside from the pleadings themselves, the following record: the Affidavit of George Plaskowitz, the Hospital's Administrator, in support of defendant's Motion; the Affidavit of William K. Bennett, an attorney from the law firm representing the plaintiff, in opposition to defendant's Motion; the Affidavit of the plaintiff physician in opposition to the defendant's motion; the Affidavit of John Coughlin, plaintiff's counsel, in opposition to the defendant's Motion; various affidavits in support of and in opposition to defendant's Motion to Dismiss, and plaintiff's Motion for Temporary Injunction;

the documentary records of the proceedings before the Credentials Committee and the Medical Staff; the appropriate Ad Hoc Committee of the Medical Staff; the minutes of the meetings of the Hospital's Board of Directors; the depositions of Dr. Robert Kerin, Dr. Peter Naiman, Dr. Anthony Sterling, Michael Gavin, Dr. Walter Shanley, George R. Plaskowitz, Administrator, Dr. Asok Kumar Re, Dr. Irwin M. Siegal, Dr. Earl R. VanDerwerker, Dr. Nicholas A. Coassin, Daniel A. Johnson, Chairman of the Executive Committee of the Hospital's Board of Directors, and Fred B. Warren, President of the Hospital and member of its Board of Directors. The contents of all of these documents fleshed out both the legal and factual claims of both parties.

It was against such a record that the District Court analyzed the appropriateness of summary judgment as a means of resolving the issues presented by plaintiff's Complaint, i.e. whether Dr. Schlein was accorded procedural and substantive due process by the Hospital in acting upon Dr. Schlein's application for staff privileges⁷¹ (App. p 1-6).

⁷¹ Since the Brief of Appellant does not make any claim that the issue of state action was improperly disposed of by summary judgment, this section of this Brief will only deal with the grant of summary judgment as to the procedural and due process claims.

The ample record, composed of facts outlining the opposing positions of the parties, provided a legally sufficient basis upon which the District Court could resolve the issues of procedural and substantive due process without the necessity and burden of a lengthy trial. See First National Bank of Ariz. v. City Service Co., 361 F.2d 671 (2nd Cir. 1967), affirmed, 391 U.S. 253, 288-90, 88 S.Ct. 1575 (1968); Beele v. Lindsay, 468 F.2d 287, 291 (2nd Cir. 1972); Dressler v. Sandpiper, 331 F.2d 130 (2nd Cir. 1964); National Cable Television Ass'n v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973); Kirk v. Home Indem. Co., 431 F.2d 554 (7th Cir. 1970); Bank of Commerce of Laredo v. City Nat. Bank of Laredo, 484 F.2d 284 (5th Cir. 1973); ^{Cert. den.,} 794 S.Ct. 1609 (1973); but see Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2nd Cir. 1975). The District Court found the legal requisites for a grant of summary judgment present, stating:

"The case is in an appropriate posture for resolution at this stage. Although plaintiff opposes defendant's motion, he contends that he is also entitled to summary judgment. Moreover, sufficient undisputed facts exist to allow determination of the legal issues presented."⁸

⁸ It merits noting that, despite plaintiff's persistently adamant claim in his Brief to this Court that the case was not sufficiently factually developed to be resolved by means of summary judgment, at the time of oral argument, as noted by the Court itself, plaintiff's counsel requested that summary judgment be granted in Dr. Schlein's favor. No comment on the inconsistency is necessitated.

It is now Dr. Schlein's contention that summary judgment was inappropriate since various material facts were sufficiently disputed, in particular, disputes as to the "real" reason for the Hospital's denial of Dr. Schlein's application (or, within a legal framework, that the Hospital's decision was arbitrary, capricious and in abuse of its discretion and therefore a denial of substantive due process), and as to the procedures afforded Dr. Schlein (or that the applicant's procedural due process rights were violated).

The latter claim can be disposed of with facility. The plaintiff's Complaint sets forth ten areas which are claimed to be procedural defaults of constitutional proportions, e.g., that Dr. Schlein was not provided with the clear charges against him, that he was denied right to counsel at the hearings, etc. The only factual dispute which would arise would be what procedures were followed in the processing of Dr. Schlein's application; either a procedure was granted and followed, or it was not. As to each and every one of the procedural due process claims, the District Court had before it a sufficient record to determine factually whether these events had or had not occurred. Each and every step of each and every procedure was fully reflected in that information which constituted the record before the District Court and, in fact, it would take some stretching of an elas-

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tic imagination to conclude such facts were in dispute. Clearly, even a full trial on the question would not provide additional information of such significance as to throw any material issue into dispute. Close analysis of the Brief of Appellant, furthermore, fails to reveal even a single specification of a procedural issue claimed to be factually disputed. In fact, none are, such that the resolution of the issue of procedural due process is a paradigm of the type falling within the scope of Fed. R. Civ. P. 56(c). The real and genuine dispute was to the legal adequacy of these procedures. The District Court properly determined that it could appropriately resolve whether Dr. Schlein was deprived of his Fourteenth Amendment right of procedural due process since there was no material dispute of any genuine fact.

Most of what has been discussed supra relative to the procedural due process issue applies with equal force to the District Court's grant of summary judgment on the issue of substantive due process. The thrust of plaintiff's argument at this juncture is that the reasons given by the Hospital for the denial of Dr. Schlein's application are merely a pretense for the vindictive actions taken by one or more physicians, and that a full hearing is necessary in order to expose the Hospital's true ill motives. The Hospital's

response to such a claim is two-fold: 1) that plaintiff's contention interjects speculation and innuendoes of the caliber which do not rise to the character of facts and are not susceptible of proof, and 2) even were the Court to hold a hearing on the issue, its scope of review would preclude examination into motive.

As to the first response, within a somewhat paranoid framework replete with references such as "prosecutor", "subterfuge" and "orchestrate", the plaintiff depicts the entire machinations of the Hospital in its attempt to provide Dr. Schlein with every procedure and right as a mere facade for a vehicle to protect the "monopoly" of orthopedic surgery allegedly enjoyed by Dr. Kerin. It may be noted incidentally that the claim of Dr. Kerin's omnipotence is somewhat diluted by the fact that he did not participate in any of the votes of the Credentials Committee or the Staff (App. p 328). To take a highly formalized, highly professional, well-supported decision, buttressed by a lengthy and extensive notice, hearing and numerous rehearings procedure, and characterize it as essentially a conspiracy is perhaps the best example of Dr. Schlein's erratic nature and his abrasive behavior. In any event, Dr. Schlein seeks not to interject facts which would disturb the balance of information, but merely nuances and innuendo. A hearing on

the issue would not leave a court with any different facts than those possessed by the District Court in deciding the Motion for Summary Judgment. Even if some evidence of personal bias by Dr. Kerin could be adduced at a hearing, such evidence could not affect the fact that otherwise objective physicians proffered negative reports about Dr. Schlein, and would not sway the great weight of evidence. (See Statement of Facts, supra, pp 12-21). Furthermore, to the extent Dr. Schlein sought to interject personalities into the case, he would quickly be confronted with the pressures he brought to bear, through threats of litigation for libel, on those physicians giving Dr. Schlein less than favorable reports (App. p 386).

A grant of summary judgment is the equivalent of a holding that there is no genuine issue as to any material fact. Not only does the interjection of motivation fail to provide a genuine issue, but it is not a material fact in the face of the undisputed evidence. While the Hospital would certainly not presume to claim that the facts are one-sided, whatever conflicts exist are of minimal importance to preclude summary judgment. Those relevant facts as to the reasons for the denial of Dr. Schlein's application, i.e. his inability to work well with others, and all of the evidence in support and in opposition considered by each body of the Hospital at each point, were reflected in the record before the District Court and clearly disclose that

the issue, again, could properly be disposed of by summary judgment.

Finally, even if a hearing on the issue of substantive due process was conducted, the "facts" regarding motivation which Dr. Schlein views as determinative would not be admissible in the appellate process. As discussed infra (see Section III of Argument), those courts reviewing the fact findings of a hospital under circumstances analagous to the case at bar have adopted one of two tests for appellate review -- either the "private hospital doctrine" rule whereby the court only examines whether the hospital acted consistent with its governing documents,⁹ or the "public trust doctrine" pursuant to which the court assesses whether the hospital's decision is supported in the record and whether it is arbitrary, capricious or unreasonable.¹⁰ Neither theory

⁹ See Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 281 A. 2d 589 (1971); Berberian v. Lancaster Osteopathic Hospital Association, Inc., 395 Pa. 257, 149 A. 2d 456 (1959); Shulman v. Washington Hospital Center, 222 F. Supp 59, 64 (1963); Edson v. Griffin Hospital, 21 Conn. Supp 55, 144 A. 2d 341 (1958). Annot: Exclusion of or Discrimination Against Physician or Surgeon By Hospital, 37 ALR 3d 645 (1972).

¹⁰ See Rao v. Auburn General Hospital, 10 Wash. App. 361, 571 P. 2d 240 (1973); Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P. 2d 564 (1972); Greisman v. Newcomb Hospital, 40 N.J. 389, 192 A. 2d 817 (1963).

of judicial review, however, can support the contention that a reviewing court should look behind the plausible and well-supported reasons for the denial of staff privileges to speculate as to motivation. It is not the proper role of an appellate court to examine and assess the credibility of witnesses, which is apparently what Dr. Schlein would seek, and in fact would have to seek in order to entertain any hopes of a reversal of the Hospital's decision. The court cannot substitute its judgment for that of the Hospital.

The claim made in the Brief of Appellant (p 14) that the District Court itself recognized the necessity of a more extensive inquiry clearly ignores the import of the Court's analysis. In the footnote cited (App. p 173) the Court confronts the question of whether the plaintiff even has a property interest protectable by the Fourteenth Amendment. After expressing doubts as to whether there is such a Fourteenth Amendment property interest, -doubts which could of course be resolved against the plaintiff after a full hearing on the issue, -the Court for the purpose of summary judgment concluded that the physician did have a protectable property interest. Thus the Court applied the legal principles controlling grants of summary judgment by drawing all reasonable inferences against the party moving for summary judgment and, in this case, in favor of Dr. Schlein. It is somewhat incomprehensible that Dr. Schlein

can assert a legal deficiency in the Court's failing to provide him with a full hearing when he could not possibly fare any better than the inferences accorded by the District Court.

Thus it is clear that a hearing as sought by Dr. Schlein would leave a court in no different position, with no additional relevant facts which would swing the weight of the evidence, than that confronted by the District Court in assessing the Motion for Summary Judgment. Those "facts" as to motivation which the plaintiff now tries to interject cannot and would not affect the ultimate determination of the legal issues. Thus, the District Court's disposition by summary judgment was appropriate, if not mandated, and should be affirmed by this Court, since the Hospital is entitled to judgment as a matter of law.

III. In The Alternative, If The District Court's Decision Sustaining Subject Matter Jurisdiction Is Affirmed, The Decision Below Should Be Affirmed On The Merits Since The Substantive Grounds For Denial Of Medical Staff Privileges Were Amply Supported In The Record And Were Developed After A Procedure Sufficient To Protect Plaintiff's Interests.

A. The District Court Correctly Held That The Reason For The Denial Of Staff Privileges, i.e., Inability Of The Applicant To Work Well With Others, Was An Appropriate Standard For Application By The Hospital And Was Adequately Supported By The Record Developed In The Application Proceedings.

Should this Court agree with the District Court's expansive view of the "state action" issue and thus sustain its subject matter jurisdiction, the Court must then face the task of framing an appropriate standard to govern the scope of its newly established judicial review responsibility. And if the Court determines that the intrusive state involvement permits the examination of the decisions of private hospital governing boards in physician staff-privilege cases, then exercise of its right of judicial inquiry must be circumscribed to permit an effective appellate scrutiny of those decisions, while at the same time insuring that the examination of the record developed does not propel the Court to substitute its own judgment of the facts for the judgment and discretion exercised by the Hospital's fact finders.

In those cases in which judicial review has been sustained, the rules defining the scope of review have been polarized at opposite ends of the appellate spectrum: 1) the "private hospital doctrine" rule which narrowly limits the scope of review to a consideration of whether the exclusion from the staff was accomplished in accordance with the Constitution, Bylaws and Regulations of the Hospital,¹¹ and 2) the "public trust" doctrine,¹² which opens up the Hospital's doors to judicial inquiry but slightly, and limits the inquiry, nevertheless, to a determination by the reviewing Court of whether the Board of Directors' decision in denying staff privileges finds support in the record and whether the action is arbitrary, capricious or unreasonable. Even if this Court adopts the rule authorizing an examination of greater breadth - as to whether the decision of the Board of Directors of the

¹¹ See Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 281 A. 2d 589 (1971); Berberian v. Lancaster Osteopathic Hospital Association, Inc., 395 Pa. 257, 149 A. 2d 456 (1959); Shulman v. Washington Hospital Center, 222 F. Supp 59, 64 (1963); Edson v. Griffin Hospital, 21 Conn. Supp 55, 144 A. 2d 341 (1958). Annot: Exclusion of or Discrimination Against Physician or Surgeon By Hospital, 37 ALR 3d 645 (1972).

¹² See Rao v. Auburn General Hospital, 10 Wash. App. 361, 571 P. 2d 240 (1973); Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P. 2d 564 (1972); Greisman v. Newcomb Hospital, 40 N.J. 389, 192 A. 2d 817 (1963).

Milford Hospital with relation to Dr. Schlein's application was arbitrary, capricious and unreasonable, in light of the record - the Hospital contends that the facts in the record can withstand such scrutiny so that the action should be sustained.

It is well established that a private hospital may establish higher standards of care for hospital staff admissions than those imposed by the State licensing authority. See Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 176 (5th Cir. 1971); Edson v. Griffin Hospital, 21 Conn. Supp. 55, 144 A.2d 341 (1958). The hospital, in the exercise of the decision to grant or deny staff privileges, is vested with a broad discretion. This scope of action was perhaps nowhere better expressed than by Judge Holtzoff in Shulman v. Washington Hospital Center, 222 F. Supp. 59, 64 (D.C.D. D.C. 1963):

"There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily, hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the

hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover, not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these, the courts are not in a position to substitute their judgment for that of professional groups." Id., at 64 (emphasis supplied).

And since personality, temperament and judgment are not only relevant considerations in evaluating a professional's suitability but are particularly difficult to evaluate, even those Courts that have opted for the more liberal review rule have not sifted the record with microscopic detail to examine the exercise of this discretion. Those reviewing courts have, more appropriately, looked to see whether under the liberal standard of judicial review the discretion has been properly or capriciously exercised. As the Court stated in Sosa v. Board of Managers of Val Verde Memorial Hospital, supra, at 176-177:

"* * *Admittedly, standards such as 'character qualifications and standing' are very general, but this court recognizes that in the area of personal fitness for medical staff privileges precise standards are difficult if not impossible to articulate. * * * The subjectives of selection simply cannot be minutely codified. The governing board of a hospital must therefore be given great latitude in prescribing the necessary qualifications for potential applicants. * * *"

"* * *

"* * *In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus."

Turning to the substantive reasons set forth in the record, the facts demonstrate the continuing difficulties the plaintiff has had in establishing harmonious relations with other physicians. The record amply supports his "erratic" behavior at the Mayo Clinic; his explosive behavior at the Strauss Medical Clinic as witnessed by Dr. Siegal, his irascible temperament at the Park City Hospital and the controversial nature of all of his prior associations. (See Affidavit of George R. Plaskowitz in Support of Motion for Summary Judgment, App. pp 106-110; 390, 307; 303; 317; 326, 325).

Although the Courts have not focused with frequency on personality problems as substantive grounds for rejecting physician applicants, this problem has received, of late, increasing attention. In Huffaker v. Bailey, 540 P.2d 1398 (Sup. Ct. Ore. 1975), a licensed physician specializing in internal medicine was denied staff privileges by the Board of Directors at the Presbyterian Inter-Community Hospital. The bylaws in Huffaker apparently were quite similar, if not identical, to the defendant's Medical Staff bylaws. Those bylaws, as well as defendants, apparently followed the recommended draft circulated by the Joint Commission on Accreditation of Hospitals so that the Presbyterian Inter-Community Hospital's bylaws, like Milford Hospital's by-laws, also required the petitioner to document with sufficient adequacy:

"1. His ability to work with others in order to assure that his patients would be given a high quality of medical care;"

To the claim that the documented ability to work well with

others was not a proper substantive standard since it did not have a bearing on medical competency and was unrelated to the quality of patient care, a claim made by appellant herein, the Court responded as follows:

"This contention has some merit, and raises a rather sensitive issue. The issue of a pleasant and cooperative personality has no direct influence on medical competence in a technical sense. But it must be remembered that the hospital is concerned not only with medical competence, but primarily with the quality of care the patients receive in the hospital. Petitioner cites Rosner v. Eden Township Hospital District, supra, for the proposition that temperamental suitability for cooperative staff hospital work is not a proper consideration relating to effective patient care. A California statute, however, provided that staff membership in public hospitals was restricted to doctors 'competent in their respective fields, worthy in character and in professional ethics.' The California Supreme Court construed this statute in delineating the exclusive criteria for public hospital staff membership, and held that under the statute the additional consideration of temperamental suitability was not an authorized criterion. Rosner, therefore, does provide direct support for petitioner's argument.

Most other courts have found that the factor of ability to work smoothly with others is reasonably related to the hospital's object of ensuring patient welfare. This conclusion seems justified for, in the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, could severely hinder the effective treatment of patients.

Although there are cases to the contrary, it appears that the better view both in logic and the case law is that 'a high quality of medical care' is not an impermissibly vague standard and that the applicant's ability to work with others is a legitimate consideration reasonably related to the quality of patient care." Huffaker v. Bailey, supra (emphasis supplied).

Several other courts have considered "tempermental unsuitability", "irascibility" or a "disruptive influence" as valid grounds for denying staff privileges. In Bricker v. Sceva Speare Memorial Hospital, supra at n. 9, the New Hampshire Supreme Court, although holding that the defendant hospital was a private charitable corporation, moved away from the majority rule and sustained subject matter jurisdiction on a "public trust" theory. The New Hampshire Court reasoned that judicial review was warranted because the public had a substantial interest in the operation of the private hospital and that, of necessity, some measure of control and judicial supervision was required. But the Court limited its examination of the record to determining whether the denial of staff privilege was determined in accordance with the bylaws of the hospital, and the decision could be reversed only if it was held to be arbitrary, capricious or unreasonable. After examining the record, the Court held that due process was afforded the physician and that the substantive reasons in the record supported the conclusion that the physician had been a disruptive force at the hospital. The facts in Bricker demonstrated that the physician was disruptive in his relations with the nursing staff and had an adverse effect on the smooth working relationships "so necessary for adequate and essential health care." The Court concluded that:

"Where as in this case the staff is small, a disruptive member is more destructive of the efficiency than in the case of a large staff where doctors work less frequently and on a less personal basis. See Bricker v. Sceva Speare Memorial Hospital, supra, at 593.

See also Woodard v. Porter Hospital, Inc.,
217 A.2d 37 (Supreme Ct., Vermont 1966)."

Similarly, in Hagan v. Osteopathic General Hospital of Rhode Island, 102 R.I. 717, 232 A.2d 596 (1967), an osteopathic physician was denied privileges because of a personality clash with the hospital administrator and because the record was "replete with incidents involving personality clashes from which the trial judge could draw an inference that the trustees were motivated in their decision...by a desire to avoid the creation of a hospital ambience not conducive to the best interests of the sick and injured for whose welfare the hospital existed." See Hagan v. Osteopathic General Hospital, supra at 601. The Court in Hagan was willing to accept the trustees' denial of privileges on the basis of this "potential" disruptive influence. See also, Susman v. Overlook Hospital Associates, N.J. 222 A.2d 530 (1966).

The denial of staff privileges in the instant case was based upon a valid reason, amply supported in the record. (See also Silver v. Castle Memorial Hospital, 53 Haw. 475, P.2d 564, cert. den. 409 U.S. 1048 (1972)). While the facts supporting Schlein's inability to work well with others are not overwhelming and, at times, in conflict, there is sufficient evidence in the record to sustain the Hospital's decision as being properly within the range of its discretion. The failure to obtain endorsements from any Bridgeport orthopedist, (App. p 317), the references in Dr. Coventry's October 10, 1973 letter to his "at times be[ing] in less than normal contact with the problems that faced him day to day

in a practical way..." (App. p 316), the essentially negative evaluation of Dr. Schlein by Dr. Irwin Siegal of the Strauss Group in Chicago, (App. p 326) - which was reaffirmed by Dr. Siegal at his deposition - (App. pp 236-237), and recollection of his apparent hostilities with Drs. Camarda and Dr. Shanley, constituted enough facts on which to bottom a rational conclusion concerning his unsuitability. Although there may be cases in which a reviewing Court will find a record so barren of factual support that it must, to avoid the validation of a capricious discretion, overturn it, the record herein does not appear to call out for such an appellate invasion.

Dr. Schlein employs a good deal of hyperbole in his attempt to characterize the decision as being an abuse of discretion. But no amount of felicitous phraseology or parade of possible horribles can transform a justifiable decision into one akin to what Dr. Schlein predicts might happen in other cases. As demonstrated by the decision in Huffaker, Bricker and Hagan, supra, the ability to get along well with others is a proper substantive standard to be employed in staff privilege admission cases. Thus, cases such as Rosner v. Eden Township Hospital District, 58 Cal. 2d 592, 25 Cal Rptr. 551, 375 P.2d 431 (1962), cited by appellant (See Appellant's Brief, pp 30, 32) are inapposite and distinguishable on the same theory employed by the Huffaker court (See p 54 , supra), i.e., that since the California Statutes provided the exclusive criteria for

determinations of public hospital staff membership, the importation and use of the tempermental unsuitability standard not prescribed by statute was inappropriate as a matter of statutory construction. Moreover, the attempted use by Dr. Schlein of First Amendment employment cases such as Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, and Mabey v. Regan, 537 F.2d 1036, Schware v. Bar Examiners, 353 U.S. 232, 328 (1957), as well as the Slochower case also falls wide of the mark. Among other distinctions, the most obvious difference between those cases and the instant appeal is that here an employee's conduct and temperament relevant to his future performance in private employment is being evaluated, whereas the cases cited by Dr. Schlein deal with prior expressions of speech in the form of political philosophy by an employee or applicant for public or quasi-public employment. Dr. Schlein attempts to transform what appears to be an attenuated Fourteenth Amendment liberty or property interest into a First Amendment free speech right, but that attempted transmutation is clearly inapposite.

Moreover, the expansion of the doctrine of hospital directors "corporate liability" coincident with the notable increase in malpractice plaintiffs produces a strong policy reason for affirming, at least in the instant case, the judgment below. Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E. 2d 253, cert. den. 383 U.S. 946 (1966), and its progeny¹³ teach

¹³ For cases dealing with the liability of the hospital governing board for careless or imprudent selection of staff members, see Purcell v. Zimbelman, 500 P.2d 335 (1972); Mauer v. Highland Park Hospital Foundation, 90 Ill. App. 2d 409, 232 N.E.

that the hospital's governing board must establish mechanisms for the medical staff to evaluate the quality of patient care and, where necessary, take action when an unreasonable risk of harm to a patient arises from the treatment being afforded. Darling establishes as the governing board's responsibility the maintenance of safeguards to insure the delivery of quality patient care in accordance with delineated professional standards. And since the "buck stops with the board" it is the board's duty to appoint only those who can conform their conduct to the task of delivering quality care. And in an era when a tidal wave of malpractice litigation raises the possibility of hospital board directors being caught in the backwash, the scrutiny of an applicant's background with a jaundiced eye should not be discouraged. If, in a small hospital setting, temperamental suitability to work closely with others can be shown to impact on quality of care, reviewing courts should exercise a reasonable restraint in surveying the record, and should sustain it if the facts adduced demonstrate a reasonable discretion based on a thorough examination of an applicant's prior performance.

- B. The Process Afforded To The Plaintiff In The Determination Of His Application For Staff Privileges Was Consistent With The Requirement Of The Due Process Clause Of The Fourteenth Amendment.

Since a large majority of physicians' privilege cases have been dismissed because of an absence of state action and consequent sub-

13 cont.) 2d 776 (1967); Joiner v. Mitchell County Hospital, 186 S.E. 2d 307 (1971).

ject matter jurisdiction, the courts have not had occasion to direct a great deal of attention to the delineation of specific procedural process standards in similar circumstances. However, the progenies of Goldberg v. Kelly, 397 US 254 (1969) have applied the due process requirement of notice and hearing to numerous situations and have delineated specific procedures, determined after a proper balancing of "the government's interest in efficient administration and the nature of the individual interest being affected by governmental action." See Escalara v. N.Y.C. Housing Authority, 425 F. 2d 853 (2nd Cir. 1970) cert. den. 400 US 853.

The District Court assumed, for the purposes of deciding the Motion for Summary Judgment that the plaintiff has a Fourteenth Amendment liberty or property interest in obtaining staff privileges at the Milford Hospital." 425 F. Supp. 541, 544. Although the Hospital might dispute that assumption and contend - as the Court intimated - "that he has neither" - , the Hospital notes that whatever property interest Schlein has is only supplementary or complimentary to his license to practice. See Board of Regents v. Roth, 408 US 564, 577 (1972). However, given the supplementary nature of the property interest, the procedural requirements to be developed for the protection of that interest must reflect a balance between the governmental interest and the nature of the individual interest being affected by the governmental action. See Case v. Weinberger, 523 F.2d 602 (2nd Cir. 1975); Frost v. Weinberger, 515 F.2d 57 (2nd Cir. 1975). See Escalara v. N.Y.C. Housing Authority, supra. As the Supreme Court stated in Cafeteria Workers v. MacElroy, 367 US 886, 895 (1961);

"[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

The fundamental requirements of due process are some kind of notice and some kind of hearing. Goss v. Lopez, 419 US 565, 579 (1975). But "the timing and content of notice and the nature of the hearing will depend upon appropriate accommodation of the competing interests involved." Id.; Cafeteria Workers v. MacElroy, supra, 367 US at 895.

Applying the balance to the competing interests in the instant action, the governmental interest sought to be protected on the one hand is the rendition of high quality care to patients by the Milford Hospital. The Board of Directors attempts to satisfy this interest by the selection of qualified physicians through the use and fair application of the qualification standards and procedures established in the Bylaws. Competing and countervailing against that governmental interest is the need for Dr. Schlein to obtain staff privileges in addition to those he already had acquired at the Park City Hospital in Bridgeport. But it has been admitted and acknowledged that the applicant's main area of practice is in Bridgeport so that the property interest sought to be asserted in Milford is only supplemental to that which he enjoys in his main locus, Bridgeport.

Given the balance of these competing interests, the plaintiff received at least as much process as was due him. He had a face to face confrontation and discussion with the Credentials Committee on November 23, 1973 (App. pp 323-324). Additionally, prior to the Committee, at which he appeared personally with a representative,

he was given a written statement of the reasons for the staff's decision. Prior to the appellate review hearing, his counsel received copies of each and every document then in the record. Furthermore, his counsel's requests to appear and argue orally and to expand the already full record with the introduction of additional evidence were both granted, making the appellate proceedings more in the nature of a de novo proceeding. And, Dr. Schlein appeared personally both before the Ad Hoc Committee and before the Appellate Review Committee of the Board of Directors and given free reign. When the status of the evidence was deemed inadequate by the Board of Directors, it was twice reversed and in effect remanded to the Medical Staff in an abundance of caution for reconsideration and careful reexamination (App. p 320, 384).

In light of this scrupulous detail, Dr. Schlein's claim that he was denied the opportunity to cross-examine those witnesses who transmitted adverse letters through the mails is without legal support or practical substance. First of all, the entire procedure for the determination of staff privileges in our mobile society necessarily depends upon the transmittal of hearsay documents in the form of letters of recommendation from one area of the country to another. More frequently than not, physicians complete their medical school at one school and complete their internship and residency in more than one place. They may apply for staff privileges at a great distance from those informants with whom they have had experience. Under these circumstances, the Medical Staff Bylaws promulgated and recommended by the Joint Commission on Accreditation of Hospitals necessarily base the entire recommendation process on

the transmittal of "hearsay" letters of recommendation.

True it is that the Milford Hospital Medical Staff Bylaws do not provide an applicant with the powers of subpoena so as to cite in the hearsay declarance to the proceedings. But the Courts have not yet required; nor could they practically do so. As was stated recently by the Eighth Circuit in denying a similar procedural due process claim by a disgruntled physician:

"As far as notice and opportunity to be heard are concerned, we do not think that the Plaintiff was entitled to any more than he received or at least was offered." See Klinge v. Lutheran Charities Assoc. of St. Louis, 523 F. 2d 56 (8th Cir. 1975);

See also Kaplan v. Carney, 404 F. Supp 161 (1975) (E.D. Mo. 1975) (Reduction in staff privileges may be accomplished by Board of Directors of private hospital without full trial. Notice and opportunity to be heard are sufficient); Matthews v. Eldridge, US , 96 S.Ct. 893 (1976) (Evidentiary hearing not required prior to termination of social security disability benefits).

Therefore, under all of the circumstances of the case, the defendant contends that the procedures afforded the plaintiff, in light of the supplemental nature of his staff privilege to his main economic bundle of rights, and in view of the need to assure a high quality of care, satisfied the requisite due process. See Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971); Don v. Okulmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971); see generally, Ludlam, Physician-Hospital Relations: The Role of Staff Privileges, LAW & CONTEMPORARY PROBLEMS (Autumn 1970 at 879; 888-892).

CONCLUSION

The case should be dismissed since the District Court did not have jurisdiction of the subject matter. In the alternative, the judgment below should be affirmed on the merits.

THE MILFORD HOSPITAL, INC.
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CERTIFICATION OF SERVICE

The undersigned hereby certifies that he served the Brief of Appellee upon John Coughlin, Esquire, 75 Broad Street, Milford, Connecticut 06460, counsel for the appellant, and Jeremy G. Zimmerman, of Wiggin and Dana, 195 Church Street, New Haven, Connecticut 06502, co-counsel for appellee, by depositing a true copy of the same, which was mailed in a postage paid and properly addressed envelope to the address of the attorney, and by depositing the same in an official depository under the exclusive care and custody of the United States Post Office within the State of Connecticut, all on May 23, 1977.

THE MILFORD HOSPITAL, INC.
APPELLEE

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May 23, 1977

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLEN P. SCHLEIN

CASE NO. 77-7021

V.

THE MILFORD HOSPITAL, INC.

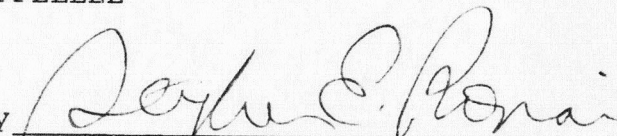
MAY 23, 1977

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